IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. [illegible]

MICHAEL BENSON, JUNE TRACY, EDDIE BROWN and LINDA HUBBARD,
Petitioners;

vs.

JOSEPH RICH, JACK JOHNSON, CHRIS DiGREGORIO, EDWARD S. ("IKE") MERRY, and RICHARD KAUZLARIC,
Respondents.

BRIEF OF RESPONDENT JOSEPH RICH IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

(1) Is an Assistant District Attorney immune from civil liability for alleged damages resulting from his interpretation of state law, his application of the same to the facts submitted to him, and his resulting advice to a state officer given at the latter's request?

(2) Did the legal advice given a state officer by the Assistant District Attorney deprive Petitioners of rights secured them by the United States Constitution?

STATUTES INVOLVED

In addition to those set forth in the petition at pages 2 and 3:

> Section 17-1-11, New Mexico Statutes Annotated, 1953:
> "Each district attorney shall:
> A. Prosecute and defend for the state in all courts of record of the counties of his district all cases, criminal and civil, in which the state or any county in his district may be a party or may be interested;
> * * *
> C. Advise all county and state officers whenever requested;
> * * *"

Section 40A-14-1, New Mexico Statutes Annotated, 1953:

> "Criminal trespass consists of unlawfully, and with malicious intent, entering or remaining upon the lands of another knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof.
>
> Whoever commits criminal trespass is guilty of a petty misdemeanor."

Section 40A-14-5, New Mexico Statutes Annotated, 1953:

"A. Wrongful use of public property consists of:

* * *

(2) remaining in or occupying any public property after having been requested to leave by the lawful custodian, or his representative, who has determined that the public property is being used or occupied contrary to its intended or customary use or that the public property may be damaged or destroyed by the use; or

(3) depriving the general public of the intended or customary use of public property without a permit.

* * *

E. As used in this section, 'public property' means any public building, facility, structure or enclosure used for a public purpose or as a place of public gathering, owned or under the control of the state or one of its political subdivisions or a religious, charitable, educational or recreational association.

F. Any person who commits wrongful use of public property is guilty of a petty misdemeanor.

G. Any person who commits wrongful use of public property after having been requested to leave by the lawful custodian or his representative or any peace officer, who has jurisdiction, is guilty of a misdemeanor."

STATEMENT OF THE CASE

This lawsuit arises out of events and occurrences that took place at the 1969 Gallup Indian Ceremonial in Gallup, New Mexico, on Friday, August 15 and Saturday, August 16. The trial judge made 18 findings of fact in granting Rich's summary judgment motion. (Petition pp. 17-20) and then made 59 findings of fact at the conclusion of a four day trial on the merits against the remaining Respondents. (Petition pp. 24-36). In their appeal to the Tenth Circuit Court of Appeals, Petitioners did not attack any of the fact findings made by the trial court as being unsupported by the evidence.

The Respondent, Joseph L. Rich, is, and was at all material times, the Assistant District Attorney for McKinley County, New Mexico, the county in which the Indian Ceremonial was held. His only involvement with this case occurred on Saturday (App. 11, 347), and, since Friday's events are adequately explained in the brief filed herein by Respondents DiGregorio, Merry, and Kauzlaric, we will not repeat them here.

Rich was at the Ceremonial grounds on Saturday as a member of a voluntary committee assisting with the Ceremonial. While there, he was handed a copy of the leaflet in question (App. 369) and was told that there had been a disturbance at the main entrance and exit to the grandstand on Friday night by a person passing out the leaflets and blocking the area. (App. 349, 350). Rich read the leaflet and came to the conclusion that its language presented a clear and imminent danger of creating or inciting a riot situation among the approximately 8,000 persons who were expected to attend each performance at the Ceremonial that day. (App. 350, 351, 353, 360).

Mr. Kauzlaric, the President of the Ceremonial Association (a state agency) approached Rich, indicated that he was concerned about another disturbance occurring and asked Rich what might be done to prevent the occurrence of such a disturbance. (App. 339, 341, 342, 343, 350, 351, 353). Rich felt that he was being approached by Kauzlaric in his capacity as Assistant District Attorney, that his advice was being solicited in that capacity, and that he gave such advice in that capacity. (App. 361, 362, 363). Rich's principal concern was to prevent a riot situation from developing. (App. 363). It is interesting to note that DiGregorio, who was present at the Friday night disturbance, had concluded that the leaflet was designed to create a disturbance or to incite a riot (App. 317), and that Officer Johnson, a state police officer trained in riot and crowd control, felt that a potential riot or trouble situation existed. (App. 329-335).

Rich asked Kauzlaric whether the Association owned the grounds and, upon being told that it did, advised Kauzlaric that, as President of the Association, he could withdraw his consent for the person handing out the leaflets to remain on the premises. (App. 353, 339). It was the judgment of the Assistant District Attorney that the New Mexico trespass statutes (Sec. 40A-14-1 and Sec. 40A-14-5, N.M.S.A., 1953) were applicable and, if consent to remain was withdrawn but Petitioners refused to leave, a criminal complaint could be filed. (App. 363, 358).

Kauzlaric then told Officer Johnson that he was withdrawing the Association's consent or permission for Benson (who was the only person Kauzlaric knew to be distributing the leaflets) to remain on the grounds, and asked Johnson to ask Benson to leave. (App. 339, 340, 323, 324, 337). Johnson passed this information along to Benson

who said he wanted to talk to Rich. (App. 323, 324). Johnson then accompanied Benson to the room where Rich was located, introduced Rich to Benson as the District Attorney or Assistant District Attorney and requested Rich to advise Benson as to what his situation was. (App. 354, 355).

Although there is some dispute as to exactly what Rich said, the evidence, even taken in a light most favorable to Petitioners, is that Rich told Benson that the Ceremonial officials did not like what he was doing with passing out the leaflets, that the Ceremonial grounds were private property, that permission for him to remain on the premises had been withdrawn, and that he would be arrested if he did not leave the premises or stop passing out the leaflets. (App. 309; cf. App. 358, 359, 324, 325, 341). Rich explained to Benson that the leaflets could be distributed in the streets. (App. 310). Benson made no reply and he and Johnson left the office. (App. 358). This was the only contact the Assistant District Attorney had with Benson and he did not even know the other Petitioners were involved with Benson much less did he have any contact with them. Johnson then accompanied Benson and his companions off the Ceremonial grounds. (App. 326-329). At no time were any of the Petitioners arrested.

Based upon the above facts, the trial court held that the Assistant District Attorney was immune from liability, made findings and conclusions explanatory of his decision and entered summary judgment in Rich's favor. This judgment was affirmed by the United States Court of Appeals for the Tenth Circuit.

REASONS FOR DENIAL OF THE WRIT

I

The Decision Below in No Way Conflicts with Other Courts of Appeals on the Issue of Immunity.

Although summary judgment was granted Rich on the theory of judicial or quasi-judicial immunity, the Tenth Circuit affirmed on the constitutional issue and did not reach the immunity question. Indeed, nowhere does the term "immunity" appear in the Tenth Circuit's decision. Its decision cannot, therefore, be said to be in conflict with other Courts of Appeals on the issue of immunity.

Even if the Tenth Circuit had reached and totally adopted the trial court's reasoning on the issue of immunity, there would still exist no reason for the issuance of the writ sought herein because there is no true conflict among the circuits on the question of the prosecuting attorney's immunity. Neither the decision by the trial court nor any of the other cases cited by Petitioners hold that a District Attorney has a "blanket immunity" solely by virtue of the position he holds and without regard to the kind of conduct involved in the particular case. All courts agree that there are limitations on the District Attorney's immunity. See *Bradley* v. *Fisher*, 13 Wall. 335, 80 U.S. 335, 20 L.Ed. 646 (1872); *Yaselli* v. *Goff*, 2d Cir., 12 F.2d 396 (1926), aff'd *per curiam* 275 U.S. 503.

As Judge Learned Hand noted in *Gregoire* v. *Biddle*, 2d Cir., 177 F.2d 579 at 581 (1949):

> "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers. . . ."

Accord: *Barr* v. *Matteo*, 360 U.S. 564, 572 (1959); *Bauers* v. *Heisel*, 3rd Cir., 361 F.2d 581 (1966); *Kostal* v. *Stoner*, 10th Cir., 292 F.2d 492 (1961); *Kenney* v. *Killian*, D.C.W.D. Mich., 133 F.Supp. 571 (1955), aff'd *Kenney* v. *Fox*, 6th Cir., 232 F.2d 288 (1956); *Jennings* v. *Nestor*, 7th Cir., 217 F.2d 153 (1954); *Norton* v. *McShane*, 5th Cir., 332 F.2d 855 (1964).

The difference, if any, between the courts exists in phrasing the limitations. This does not create any true conflict between the Circuits. Furthermore, regardless of the manner in which the limitations on the District Attorney's immunity are phrased, there is no conflict in applying those limitations to the facts. The acts allegedly committed by the prosecuting attorneys in *Robichaud* v. *Ronan*, 9th Cir., 351 F.2d 533 (1965) and *Lewis* v. *Brautigam*, 5th Cir., 227 F.2d 124 (1955) would have resulted in a denial of the defense of immunity whether the cases were decided by the Tenth Circuit or by any other circuit wherein Petitioners contend a conflict as to the scope of immunity exists.

The trial court held that the Assistant District Attorney was entitled to immunity because, at all material times, he was acting in his judicial or quasi-judicial capacity in the performance of his duties concerning matters within his jurisdiction. (Petition App. A. page 21). At the request of a state officer, Rich interpreted New Mexico law, applied the same to the facts submitted to him, and advised the officer as to what might be done to prevent a riot situation from developing. Under Section 17-1-11(c), N.M.S.A., 1953, Rich had a mandatory duty to "advise all state officers whenever requested" and it was his fulfillment of such duty which gave rise to the claim against him. The District Attorney also had a statutory duty to prosecute all criminal cases in which the state may be a party or may be interested. Section 17-1-11(a), N.M.S.A., 1953. Cer-

tainly his duties are not limited to situations where a criminal offense has already been committed, and if he has an opportunity to prevent a situation of possible violence from developing, it would appear that he would be derelict in his duties if he failed to do so. Rich's decision that Benson's activities had or would violate state law is similar to the decision which precedes the presentation of a case to the grand jury or the approval of a criminal complaint being filed. Can it be seriously argued that Rich was not acting in the performance of his official duties or that his legal advice had no connection with the general matters committed to his authority and jurisdiction?

The thrust of Petitioners' case against Rich was that his decision and his legal advice were erroneous. Even if it were, which we do not at all concede, this does not mean that Rich was acting outside the performance of his duties or that his immunity had been removed. *Kenney* v. *Killian*, D.C.W.D. Mich., 133 F.Supp. 571 (1955), aff'd *Kenney* v. *Fox*, 6th Cir., 232 F.2d 288 (1956). See *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682 (1949); *Lewis* v. *Brautigam*, *supra*.

In the present case there was no arrest. However, even if Petitioners had refused to leave the Ceremonial grounds and had, in fact, been arrested and prosecuted and either acquitted in a trial on the merits or their case dismissed by the court, it is clear that the District Attorney would be immune from liability. *Yaselli* v. *Goff*, *supra*. *Bauers* v. *Heisel*, *supra*. *Cawley* v. *Warren*, 7th Cir., 216 F.2d 74 (1954). We submit that a District Attorney should not be liable for advice not even resulting in an arrest.

II

The Decision Below Did Not Decide an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

As noted above, the Tenth Circuit did not decide any issue relative to the immunity of a prosecuting attorney.

Moreover, the existence and scope of judicial and quasi-judicial immunity under Section 1983 of the Civil Rights Act was decided by this Court in *Pierson* v. *Ray*, 386 U.S. 547 (1967). Although the case only dealt specifically with the immunity of a police justice, this Court held previously in *Yaselli* v. *Goff*, *supra*, that a prosecuting attorney has the same immunity as a judge. In footnote nine, this Court in *Pierson* cited *Bauers* v. *Heisel*, 3rd Cir., 361 F.2d 581 (1966), as an example of the consistent holdings that "judicial immunity" is a defense to an action under Section 1983. The *Bauers* case, *supra*, dealt with the immunity of a county prosecutor. See also, *Cawley* v. *Warren*, 7th Cir., 216 F.2d 74 (1954); *Kenney* v. *Fox*, 6th Cir., 232 F.2d 288 (1956); *Kostal* v. *Stoner*, 10th Cir., 292 F.2d 492 (1961).

III

The Decision Below Is Not in Conflict with Monroe v. Pape.

Petitioners contend that the decision below is somehow in conflict, on the issue of immunity, with this Court's holding in *Monroe* v. *Pape*, 365 U.S. 167 (1961). The same argument was apparently made in *Pierson* v. *Ray*, *supra*, and the Court's answer is equally dispositive here:

> "*Monroe* v. *Pape* presented no question of immunity, however, and none was decided."

386 U.S. at 556. See e.g. *Rhodes* v. *Houston*, D.C. Neb., 202 F.Supp. 624 (1962), aff'd 8th Cir., 309 F.2d 959, cert. den. 377 U.S. 909.

IV

The Decision by the Court of Appeals Does Not Conflict with Recent Decisions of This Court Concerning Free Exercise of Expression.

In the first place, the decision by the Tenth Circuit was based upon the special and unique fact circumstances surrounding the events which occurred at the Gallup Indian Ceremonial on Friday and Saturday, the atmosphere at those times and places, and the language of the particular leaflet in question. All applicable constitutional principles were observed. Petitioners simply disagree with the facts and feel that the courts below erred. It is not the proper function of certiorari to correct these matters. See address of Chief Justice Vinson before the American Bar Association, September 7, 1949, 69 Sup. Ct. V, VI. In their appeal to the Tenth Circuit, the Petitioners did not choose to attack the sufficiency of the evidence to sustain any fact findings made by the trial court. See 448 F.2d at 1374. Although we recognize that there are special circumstances where this Court will examine the facts, we question whether that rule should apply here.

Ignoring all of the other facts detailed by the Tenth Circuit in its opinion, Petitioners contend that the holding against them was premised only upon two facts and then proceed to attack those facts. The decision below was not grounded solely upon the finding that the leaflet in question was a "call to arms" and it was necessary that its distribution be halted to prevent possible disorders or riots, or upon the remark about tearing apart or burning down the facilities. As mentioned above, the decision was based upon a broad combination of facts and circumstances.

Leafletting and other similar activities may be constitutionally regulated or prevented where it is disruptive of the use to which the public has dedicated the property in question or it interferes with the rights of other members of the public to the normal use of the property. *Adderly v. State of Florida*, 385 U.S. 39 (1966); *Amalgamated Food Employees Union Local 590 v. Logan Valley, Inc.*, 391 U.S. 308 (1968); *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969); *Huxley v. Hinckley*, D.C. Mass., 304 F.Supp. 704 (1969), aff'd 396 U.S. 277 (1970). That is what the Court found existed here. Rich had been advised by the President of the Ceremonial that Petitioners' conduct had already disrupted the use of the property for such purposes and interfered with the rights of other members of the public to enjoy the normal use of the property, and that the President was concerned that a repetition of such conduct could result in even more serious consequences. The Assistant District Attorney was not required to conduct his own independent evidentiary investigation before advising the President of the state agency as to the applicability of local criminal statutes and as to what might be done to prevent further disorder and, perhaps, violence. He was entitled to rely upon the facts submitted to him. *Pearson v. Reed*, 6 Cal. App.2d 277, 44 P.2d 592 (1935).

The situation presented to Rich for his on-the-spot decision and advice was similar to that presented to the college authorities in *Norton v. Discipline Committee of East Tennessee State University*, 6th Cir., 419 F.2d 195, cert. den. 399 U.S. 906 (1970). Those in charge of the situation need not wait until violence has actually occurred before acting. As the court below said in the instant case:

> ". . . those in charge could take reasonable and good faith action to prevent a disastrous situation which they had reason to believe could occur."

448 F.2d at 1374.

The court's decision below does not conflict with *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Cohen* v. *California*, 403 U.S. 15 (1971) or *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971). In those cases, unlike ours, there was no violence, disruption or disturbance, nor was there any reasonable expectation of violence or disturbances.

The Court in *Bachellar* v. *Maryland*, 397 U.S. 564 (1970), pointed out that the disorderly conduct convictions involved therein would have been sustained if they had been based upon findings that those involved blocked the sidewalks and refused to get up and move after being ordered to do so by the police. The infirmity with the convictions was the fact that, under the instructions to the jury, the defendants could have been convicted solely upon the ground that they were advocating unpopular ideas. As the Court said in the present case at page 1374:

> "The action of the public officials was not directed toward the dissemination of ideas or opinions; but solely to maintain peace and order on the ceremonial grounds and the prevention of violence and a riotous situation."

Nor does the decision below conflict with *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968). That case was reversed solely upon the ground that the temporary restraining order prohibiting a white supremist and racist organization from holding a rally was acquired *ex parte*, without notice to the petitioners, and without any effort, however informal, to invite or permit their participation in the proceedings.

CONCLUSION

The Respondent, Joseph L. Rich, respectfully submits that there are no special or important reasons for granting the writ of certiorari and for that and the foregoing reasons respectfully requests that the Petition for a writ of certiorari be denied.

Respectfully submitted,

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